No. 82-1104

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

GA TECHNOLOGIES INC. AND
GENERAL ATOMIC COMPANY,

*Petitioners,*

v.

UNITED NUCLEAR CORPORATION,

*Respondent.*

**On Petition for a Writ of Certiorari to the Supreme Court of New Mexico**

## BRIEF FOR RESPONDENT IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the judgment vacating the arbitration awards violated the opinions and mandates of this Court in *General Atomic Co. v. Felter*, 434 U.S. 12 (1977), and *General Atomic Co. v. Felter*, 436 U.S. 493 (1978), and whether the Court should reach that issue in view of a holding below that the petitioners' arguments were concluded by the New Mexico doctrines of *res judicata* and law of the case.

2. Whether the court below went beyond the scope of judicial review of an arbitration award under § 10 of the Federal Arbitration Act in holding that the arbitrators exceeded their powers and jurisdiction in proceeding to arbitration despite final New Mexico judgments which had determined that petitioner had waived any right to arbitrate, that all issues were inarbitrable antitrust issues or inextricably entwined therewith, and that the entire agreement between the parties including its arbitration clause was null, void, unenforceable and of no effect whatever.

3. Whether § 10 of the Federal Arbitration Act deprived the New Mexico courts of venue to review the arbitration awards.

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Respondent United Nuclear Corporation (UNC) [1] respectfully requests that the petition for writ of certiorari be denied.

## STATUTORY PROVISIONS INVOLVED

The Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1976), is reproduced in the Appendix hereto.

[1] United Nuclear Corporation is a subsidiary of UNC Resources, Inc., and it has no subsidiaries or affiliates within the meaning of Rule 28.1.

## STATEMENT OF THE CASE

General Atomic Company (GAC)[2] seeks review of a decision of the Supreme Court of New Mexico which affirmed a trial court judgment vacating, pursuant to § 10 of the Federal Arbitration Act, 9 U.S.C. § 10, certain arbitration awards concerning a dispute between the parties over a uranium supply agreement (the 1973 Supply Agreement). The courts below held that the arbitrators exceeded their powers and jurisdiction when they proceeded to arbitrate the dispute despite prior final judgments by the New Mexico courts establishing that (1) GAC had waived any right to arbitrate, (2) in any event no issues were arbitrable, and (3) the entire 1973 Supply Agreement, of which the arbitration clause was a part, was "null, void, unenforceable and of no effect whatever." This Court has considered and denied previous petitions by GAC for review of those judgments, despite repeated arguments by GAC — resurrected here — that the New Mexico court in exercising jurisdiction to make decisions adverse to the merits of GAC's arbitration claims violated the opinions and mandates of this Court in *General Atomic Co. v. Felter*, 434 U.S. 12 (1977) (*"Felter I"*) and *General Atomic Co. v. Felter*, 436 U.S. 493 (1978) (*"Felter II"*).

While the issues now presented are relatively simple, GAC's latest petition culminates a long history of litigation — in the New Mexico courts and in other courts, including numerous resorts by GAC to this Court — which places those issues in a different light from that which appears from GAC's truncated statement of the case. We believe that the following restatement of the case will assist the Court by rectifying omissions in GAC's description of the factual background as well as in rebutting certain of GAC's characterizations of the facts and

[2] GAC and GA Technologies Inc., a newly-formed corporation that was not a party below, have filed a motion to substitute GA Technologies Inc. for GAC as petitioner. UNC has opposed that motion, which is pending. Throughout this brief we shall treat GAC as the petitioner.

representations as to the need for review by this Court. As we shall demonstrate, the decision below is correct, there is no conflict of decisions, and there is no issue which has not been but should be reviewed by this Court.

## A. The New Mexico Litigation

### 1. Initiation of the New Mexico Litigation and GAC's Decision to Litigate Rather Than Arbitrate.

In 1975, UNC sued GAC in the Santa Fe, New Mexico, trial court. The complaint alleged that a uranium supply contract (the 1973 Supply Agreement) was void for several reasons, including GAC's violations of the New Mexico Antitrust Act. Although the agreement contained an arbitration clause, at no time during the nine months of active litigation preceding April 2, 1976, did GAC give UNC or any court notice of an election to arbitrate rather than litigate its 1973 Supply Agreement disputes. [3]

### 2. The April 2, 1976 Injunction and the Felter I Decision.

On April 2, 1976, the New Mexico trial court issued a preliminary injunction restraining GAC "from filing or prosecuting any other action or actions against United Nuclear Corporation in any other forum relating to any rights, claims or the subject matter of this action," including "the institution or

[3] GAC states that "[i]n March 1976, before an answer to the complaint had to be filed, GAC formally expressed its intention to arbitrate with UNC pursuant to this provision [the arbitration clause of the 1973 Supply Agreement]." Pet. 4. No record citation is given for this incorrect assertion. In a judgment which, as affirmed, this Court declined to review, the trial court found that GAC did not "in any way manifest its intention or desire to arbitrate rather than litigate" prior to November 29, 1977. See p. 6 *infra*.

prosecution of * * * arbitration * * *."[4] On its face, that injunction limited only what the parties might do "in any other forum"; it did not limit what they might do in the trial court. As that court found in its December 27, 1977 decision (see pp. 6-7 *infra*), the injunction "did not prohibit GAC from demanding arbitration with UNC in this forum." (Ex. 11,[5] Finding 13. See also Pet. App. 3a.)

In *Felter I*, this Court granted GAC's petition for a writ of certiorari and reversed a decision by the New Mexico Supreme court upholding the April 2, 1976 injunction. Specifically, this Court held that the Supremacy Clause as construed in *Donovan v. Dallas*, 377 U.S. 408 (1964), prohibits a state court from enjoining a party from initiating subsequent *in personam* actions in federal forums or invoking federal rights. See 434 U.S. at 15-19. The case was remanded "for further proceedings not inconsistent with this opinion." 434 U.S. at 19.

**3. GAC's Failure to Seek Arbitration After April 2, 1976.**

GAC did not request the trial court to stay its proceedings pending either arbitration or review of the April 2, 1976 injunction; rather, it continued to litigate in the New Mexico courts for more than 19 months before demanding arbitration under the 1973 Supply Agreement and moving for a stay of court proceedings pending such arbitration.

On May 5, 1976, GAC filed its answer to the complaint and counter-claimed against UNC. The eighth defense of the answer

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[4] The full language of the injunction is quoted in *Felter I*, 434 U.S. at 14 n.4.

[5] Two principal sets of exhibits were filed by UNC in the proceeding below. Citations in the form "Ex. .... " are to the set of 71 exhibits that had also been filed in the Southern District of California (see pp. 11-12 *infra*); citations in the form "12/23/80 Ex. .... " are to the set of 79 exhibits filed on December 23, 1980.

(Ex. 4, pp. 22-23) included allegations that "some" unspecified "issues in this case are subject to arbitration pursuant to Article XVII" of the 1973 Supply Agreement; that certain utility companies had demanded arbitration under their contracts with GAC and that UNC's "obligations to General Atomic may be affected" by those utility arbitration proceedings. GAC went on in its eighth defense to state that it "demands arbitration" of "only" those issues which GAC might ultimately be required to arbitrate with the utility companies,[6] but added:

> "Specifically excluded from the scope of this arbitration demand are all other arbitrable issues, including any concerning the validity and enforceability of the 1973 Uranium Supply Agreement."

GAC thus renounced any intention to arbitrate under the 1973 Supply Agreement. Moreover, GAC's election to litigate, rather than arbitrate, the issues relating to the 1973 Supply Agreement was confirmed by its counterclaim, which requested the court to specifically enforce that Agreement and award actual and punitive damages for its breach without any reference to arbitration. (Ex. 11, Finding 9.)

During the period between the filing of its answer and counterclaim and November 1977, GAC engaged in extensive pretrial discovery and other pretrial proceedings. GAC drafted the portion of a pretrial order, entered on August 22, 1977, setting forth its claims against UNC, without referring to a claim or demand for arbitration. In September 1977, after its discovery was completed, GAC moved for summary judgment on UNC's claims. The motion was denied on October 27, 1977. GAC repeatedly sought and obtained extensions of time and discovery

[6] By thus demanding arbitration with UNC in regard to issues to be arbitrated with the utilities under those separate contracts, GAC made unmistakably clear that it did not regard the April 2, 1976 injunction as preventing it from demanding arbitration with UNC.

orders from the trial court for the purpose of preparing for trial. It repeatedly invoked the appellate jurisdiction of the New Mexico courts on rulings not to its liking. See Ex. 11, Findings 15-21. But, as the trial court later found:

> "At no point between the commencement of the first action, filed as Cause No. 50044 in District Court for Santa Fe County, New Mexico, and the filing of the pending Motion for Stay (a period of more than two years), did GAC file a demand for arbitration, petition any court for an order compelling arbitration, petition this court for a stay of proceedings pending arbitration, or in any way manifest its intention or desire to arbitrate rather than litigate the issues between the parties arising under the 1973 Supply Agreement." *Id.*, Finding 12.

**4. The Judgments of the New Mexico Courts as to Arbitrability and the Felter II Decision.**

On November 29, 1977 in San Diego, California, GAC filed with the American Arbitration Association (AAA) a demand to arbitrate the disputes concerning the validity and enforceability of the 1973 Supply Agreement, and on November 30, 1977, GAC filed in the New Mexico trial court a motion for a stay of the proceedings in that court pending such arbitration pursuant to 9 U.S.C. § 3. At that time, the New Mexico case had been in trial for approximately a month. UNC resisted GAC's motion and filed a countermotion for an order enjoining arbitration.

On December 16, 1977, the trial court entered a partial final judgment enjoining arbitration (Ex. 9) and, on December 27, 1977, entered a partial final judgment denying a stay pending arbitration (Ex. 12). On the basis of extensive findings that have been cited throughout this statement, the trial court concluded, *inter alia*, that "GAC has waived any rights to demand

arbitration from UNC and has been in default in exercising these purported rights"; that "[t]he issues arising under the New Mexico Antitrust Laws * * * may not be submitted to arbitration"; and that "[a]ll issues in this case are so intertwined with issues arising under the New Mexico Antitrust Laws that none of the issues can properly be submitted to arbitration." (Ex. 11, Conclusions 2, 7 and 8.)

GAC petitioned this Court for a writ of mandamus to set aside *both* the December 16 and the December 27, 1977 judgments on the ground that they violated this Court's decision and mandate in *Felter I*. On May 30, 1978, this Court issued its *Felter II* opinion granting GAC's petition insofar as it is requested that the December 16, 1977 judgment be vacated. The Court concluded that the December 16 judgment violated the decision and mandate in *Felter I*, which "held that [the trial court] lacked the power to * * * interfere with attempts by GAC to assert in federal forums what it views as its entitlement to arbitration." 436 U.S. at 496. However, this Court expressly denied GAC's petition insofar as it also sought vacation of the December 27, 1977 judgment denying GAC's request for a stay pending arbitration. As this Court explained, that judgment did not prevent "GAC from pursuing its arbitration claims in other forums" (436 U.S. at 498 n.2), and:

> "Clearly, our prior opinion did not preclude the [trial] court from making findings concerning whether GAC had waived any right to arbitrate or whether such a right was contained in the relevant agreements. Nor did our prior decision prevent the Santa Fe court, on the basis of such findings, from declining to stay its own trial proceedings as requested by GAC pending arbitration in other forums." 436 U.S. at 496-97.

The New Mexico Supreme Court then invited the parties to submit their views as to the effect of *Felter II* upon the pending

appeal from the December 27, 1977 judgment. (12/23/80 Ex. 10, pp. 29-30.) GAC urged that all of the trial court's actions and judgments after April 2, 1976, violated the mandates of the *Felter* decisions and thus were void and *coram non judice*. (12/23/80 Exs. 15, 17.) But on May 7, 1979, the New Mexico Supreme Court affirmed the December 27, 1977 judgment in all respects. *United Nuclear Corp. v. General Atomic Co.*, 93 N.M. 105, 597 P.2d 290.[7] GAC's petition for writ of certiorari was denied. 444 U.S. 911 (1979) (No. 79-190).

**5. The Default Judgment Against GAC.**

After GAC's motion for a stay pending arbitration was denied, the trial proceeded. On March 27, 1978, the trial court entered a sanctions order and default judgment in favor of UNC on its claims against GAC, excepting damages, and struck GAC's defenses and counterclaims (Ex. 18). The factual basis for imposing sanctions was set forth in 44 recitals which detailed GAC's discovery failures. Among other things:

> "Based on all facts, the Court is forced to conclude * * * that GAC has followed a consistent pattern and practice of concealing, rather than revealing, highly relevant documents to the Court and to the parties here, and that

[7] Among other things, the New Mexico Supreme Court held: (1) the trial court had the jurisdiction and duty, under Section 3 of the Federal Arbitration Act, to determine whether GAC had waived its right to demand arbitration by litigation conduct amounting to a default in proceeding with arbitration (597 P.2d at 299); (2) the April 2, 1976 injunction never prohibited GAC from moving the trial court for a stay pending arbitration or from otherwise asserting in that court a demand for arbitration (*id.* at 303-05); (3) the record supported the trial court's findings of fact and conclusion that GAC had waived any right to arbitrate (*id.* at 295-307, 313); (4) in any event, the New Mexico antitrust issues were not arbitrable and all other issues were so intertwined with and permeated by those antitrust issues that they too were not arbitrable (*id.* at 309-13); and (5) the trial court's denial of GAC's motion for a stay pending arbitration was not in violation of or inconsistent with the *Felter* decisions (*id.* at 309).

such actions and practices have been contumacious, intentional, willful, deliberate and, in the utmost bad faith." *Id.*, Recital 24.

On April 4, 1978, the trial court entered a judgment declaring that the 1973 Supply Agreement violated the New Mexico Antitrust Act and thus "is null, void, unenforceable and of no effect whatever" and that "performance thereunder is excused" (Ex. 19, ¶A). On August 29, 1980, the New Mexico Supreme Court affirmed the trial court in all material respects. *United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 629 P.2d 231.

GAC appealed to this Court seeking review not only of the New Mexico Supreme Court's August 29, 1980 decision but also of that court's May 7, 1979 arbitrability decision, insofar as it had rejected GAC's arguments that the *Felter* decisions had been violated. This Court dismissed GAC's appeal for want of jurisdiction and denied certiorari. *General Atomic Co. v. United Nuclear Corp.*, 451 U.S. 901, *rehearing denied*, 452 U.S. 932 (1981) (No. 80-1360). Thus, the judgments affirmed by the May 7, 1979 and August 29, 1980 decisions of the New Mexico Supreme Court have been final for all purposes for more than two years.

### B. The Arbitration Proceedings and UNC's Efforts to Halt Them.

Arbitration of the 1973 Supply Agreement disputes was never ordered by any court, and GAC never petitioned any court for such an order pursuant to 9 U.S.C. § 4. After GAC's demand for arbitration on November 29, 1977, the AAA assured UNC that it would hold the arbitration proceedings in abeyance "pending final resolution of its arbitrability by the appropriate court" (Ex. 17). Notwithstanding that undertaking and repeated

objections by UNC that arbitration would be inappropriate and illegal while the New Mexico judgments of December 27, 1977, and April 4, 1978, remained in effect (Ex. 23, 25, 27), on July 26, 1978 (two months after the *Felter II* decision and while the arbitrability issue and the default judgment were pending on GAC's appeals to the New Mexico Supreme Court), the AAA notified UNC that it would proceed and directed UNC to appoint its arbitrator (Ex. 31).[8]

UNC designated an arbitrator under protest, protested the jurisdiction of the arbitrators, and reiterated that protest verbally and in writing at every juncture. (Exs. 33, 36, 38, 40; Ex. 43, pp. 347-50.) UNC was assured by GAC that "GAC will not claim that UNC's assertions, discussion, and trying of its claims, under protest, constitute waiver or abandonment of its position on *res judicata* and full faith and credit" (Ex. 41). When the arbitrators scheduled a preliminary hearing in San Diego in March 1979, UNC appeared under protest for the sole purpose of objecting to jurisdiction, and when the arbitrators decided to hold hearings on nonjurisdictional issues, UNC immediately withdrew from the proceeding (Ex. 43).[9]

On November 14, 1979, a majority of the arbitration panel issued a "Partial Award" concluding that the New Mexico proceedings were "coram non judice" and that, accordingly, the

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[8] On July 31, 1978, UNC filed suit against the AAA in the United States District Court for the District of New Mexico, arguing that the New Mexico judgments precluded arbitration. In decisions dated September 27 and October 26, 1978 (Pet. App. 152a and Ex. 35), Judge Bratton for that court dismissed the complaint for lack of subject matter jurisdiction.

[9] Following the decision of the arbitrators to hear the nonjurisdictional issues, UNC filed suit in the United States District Court for the Southern District of California against GAC, the AAA and the arbitrators to enjoin the continuation of arbitration, but that suit was dismissed for lack of subject matter jurisdiction, as was a subsequent suit by UNC against Gulf Oil Corporation, one of GAC's consitituent partners. (Exs. 46, 51; Pet. App. 160a.)

New Mexico judgments "are not res judicata and they are not entitled to full faith and credit." (Pet. App. 37a, 59a.) They also concluded that GAC had not waived its arbitration rights. (*Id.* 60a-66a.) On June 13, 1980, UNC's counsel wrote to the AAA reaffirming that UNC "has not participated in the arbitration except in efforts, undertaken under protest, to procure its dismissal and it will not participate in the arbitration or hearings or proceedings therein * * *" (Ex. 58). Without the presence of either UNC or a UNC-designated arbitrator, the two remaining arbitrators proceeded with hearings and, on September 10, 1980, issued a "Final Award" (Pet. App. 92a). In that award, the two arbitrators accepted GAC's *ex parte* case of contract breach, purported to pass upon UNC's antitrust claims and concluded that there was no showing of an antitrust violation, awarded damages to GAC in the amount of $301,181,635, and ordered UNC to specifically perform certain provisions of the 1973 Supply Agreement amounting to delivery of over 15 million pounds of uranium concentrates to GAC.

**C. Proceedings to Review the Arbitration Awards.**

On June 9, 1980, UNC filed a First Petition for Supplemental Relief in the New Mexico trial court seeking to vacate the partial award. On September 15, 1980, UNC filed a Second Petition for Supplemental Relief and Application to Vacate Arbitration Award, which requested vacation of the final award pursuant to 9 U.S.C. § 10 and incorporated by reference the First Petition for Supplemental Relief. Shortly thereafter, GAC removed those proceedings to the United States District Court for the District of New Mexico.

On September 12, 1980, GAC filed an application in the United States District Court for the Southern District of California to confirm the Final Award. On October 24, 1980, Judge Enright for that court dismissed that application on the

ground that the Federal Arbitration Act did not provide an independent basis for federal jurisdiction. That decision was affirmed, *General Atomic Co. v. United Nuclear Corp.*, 655 F.2d 968 (9th Cir. 1981), and this Court denied GAC's petition for writ of certiorari on February 22, 1982. 455 U.S. 948, *rehearing denied*, 102 S.Ct. 1449 (No. 81-1221).

On the same day that its confirmation action was dismissed by the Southern District of California, GAC filed an application to confirm the arbitration awards, under 9 U.S.C. § 9, in the Superior Court of the State of California for the County of San Diego. UNC, appearing specially, moved to dismiss the proceeding for lack of *in personam* jurisdiction. After the trial court denied that motion, UNC petitioned the California Court of Appeal for a peremptory writ of mandate. On December 16, 1980, that court filed its opinion and judgment letting "a peremptory writ of mandate issue * * * directing the superior court to dismiss [that] action." *United Nuclear Corp. v. Superior Court*, 113 Cal. App. 3d 359, 169 Cal. Rptr. 827. Among other things, the Court of Appeal rejected GAC's argument that personal jurisdiction could be based upon the arbitration clause in the 1973 Supply Agreement, since the decisions of the New Mexico courts holding that agreement to be void "are entitled to full faith and credit," and concluded that the record did not otherwise "reveal a sufficient basis to establish personal jurisdiction" over UNC. The California Supreme Court denied GAC's petition for hearing on February 18, 1981. This Court denied GAC's petition for writ of certiorari on October 5, 1981. *General Atomic Co. v. United Nuclear Corp.*, 454 U.S. 878, *rehearing denied*, 454 U.S. 1093 (No. 80-2106).

In the meantime, the United States District Court for the District of New Mexico had, on December 11, 1980, granted UNC's motion to remand the New Mexico proceedings seeking vacation of the arbitration awards on the ground that the Federal

Arbitration Act did not provide an independent basis for federal jurisdiction. (12/23/80 Ex. 77, 78.) Following the remand, Judge Musgrove for the New Mexico trial court, on January 9, 1981, issued an opinion, decision and judgment vacating the arbitration awards (Pet. App. 20a-35a). Among other things, the court concluded that it had jurisdiction to review the arbitration awards under § 10 of the Federal Arbitration Act (Pet. App. 20a-21a, 33a), and that the arbitrators had exceeded their jurisdiction and powers and acted in manifest disregard of the law (*id.* 32a). In so ruling, Judge Musgrove relied upon the prior judgments upheld in the May 7, 1979 and August 29, 1980 decisions of the New Mexico Supreme Court, as to which this Court had denied review, holding those judgments to be the law of the case and *res judicata* on the issues decided therein (*id.* 24a-27a, 32a).

GAC appealed to the New Mexico Supreme Court. At the same time, however, it petitioned this Court for a writ of mandamus to the trial court, alleging that the judgment vacating the arbitration awards violated this Court's mandates in *Felter I* and *Felter II*. This Court denied the petition on October 5, 1981. *In re General Atomic Co.*, 454 U.S. 811 (No. 80-2107).

On September 15, 1982, the New Mexico Supreme Court affirmed the judgment vacating the arbitration awards. (Pet. App. 1a-19a; 651 P.2d 1277.) Among other things, the court held that the judgment did not conflict with this Court's *Felter* decisions (Pet. App. 10a-11a); that GAC's arguments to the contrary were barred under New Mexico law by *res judicata* and law of the case (*id.* 12a-13a); that the Federal Arbitration Act did not deprive the New Mexico courts of jurisdiction or venue to review the arbitration awards (*id.* 14a-16a); and that the trial court had properly concluded that "the arbitrators had no jurisdiction to issue an award," but rather had "acted in manifest disregard of the law and in excess of their powers" in disregarding the New Mexico judgments that established both inarbitrability and the invalidity of the 1973 Supply Agreement (*id.* 17a-18a). Rehearing was denied on October 4, 1982.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Federal Arbitration Act provides that disputes over arbitrability may be judicially determined prior to arbitration on a motion to stay litigation concerning the underlying agreement or on a motion to compel arbitration if such litigation has not been instituted. On a motion by GAC to stay litigation of the contractual dispute underlying this case, the New Mexico courts determined that GAC had waived arbitration through litigation conduct inconsistent therewith and that, in any event, since the underlying dispute consisted of antitrust issues and issues inextricably entwined therewith, no issues were arbitrable. Federal court decisions unanimously hold that those determinations are for a court — rather than an arbitrator — to make, and this Court denied review of the New Mexico decision. The New Mexico courts proceeded with the litigation and entered a judgment holding the underlying agreement including its arbitration clause to be null and void, and this Court also refused to review that decision. Federal court decisions unanimously hold that a dispute which has been decided in litigation cannot be arbitrated. Nonetheless, an arbitration panel made its own determination of the waiver issue and undertook to arbitrate the underlying dispute — including the antitrust issues — in lawless disregard of the procedures established by the Federal Arbitration Act and the decisions of the New Mexico courts.

GAC's contentions to the effect that this Court's *Felter* decisions determined that GAC had a right to arbitrate and that the New Mexico courts have no jurisdiction to rule to the contrary have repeatedly been made and rejected in prior proceedings. This Court made entirely clear in *Felter II* that, while the New Mexico courts could not enjoin or restrict GAC from attempting to assert its arbitration claims in other forums,

the New Mexico courts could make determinations as to waiver and arbitrability and thus proceed with the litigation before them. GAC's contrary contentions have been rejected by both the New Mexico and California courts in final decisions which this Court refused to review. Those decisions were held by the court below to be binding under New Mexico doctrines of *res judicata* and law of the case, thus providing an independent basis in state law which is not reviewable here. In any event, GAC's contentions have no merit. The judgment vacating the arbitration awards does not restrict GAC from attempting to assert its arbitration claims in other forums, but simply determines the merits of issues properly before the New Mexico courts on judicial review of the arbitration awards.

Section 10(d) of the Federal Arbitration Act expressly authorizes a court to vacate an arbitration award "[w]here the arbitrators exceeded their powers." The arbitrators clearly exceeded their powers and jurisdiction by purporting to arbitrate a dispute which has been judicially determined in final litigation between the parties to be inarbitrable and which has been finally disposed of in such litigation. The venue provision in § 10(a) of the Federal Arbitration Act is expressly limited to the venue of "United States court[s]" and does not deprive the New Mexico courts of venue of this review proceeding. The rulings of the New Mexico courts so holding do not conflict with decisions of any other court, and GAC's arguments do not raise any issue which should be decided by this Court.

## ARGUMENT

### I. The Opinions and Mandates of the Felter Decisions Did Not Preclude the New Mexico Courts from Reviewing the Arbitration Awards.

GAC attempts once again (Pet. 12-15) to persuade this Court that its *Felter* decisions deprived the New Mexico courts of

jurisdiction to take any action adverse to GAC's arbitration claims, rather than simply precluding those courts from enjoining attempts by GAC to assert such claims in federal forums. There never was any substance to that argument; it was squarely rejected by this Court in *Felter II;* and this Court repeatedly has refused to review subsequent repetitions by GAC of that argument. If possible, there is even less reason for review on this occasion as the decision below was independently grounded upon the New Mexico law of *res judicata,* and thus upon state law that is not reviewable by this Court.

In *Felter I,* a preliminary injunction had restrained both GAC and UNC from "filing or prosecuting any other action or actions * * * in any other forum relating to * * * the subject matter of this action," including "arbitration proceedings * * *." 434 U.S. at 14 n.4. While holding that the injunction violated the Supremacy Clause insofar as it enjoined the parties from proceeding in federal forums, this Court neither held nor suggested that GAC had a right to arbitrate or that the New Mexico courts lacked jurisdiction to proceed with the litigation. Rather, the Court applied the doctrine of *Donovan v. Dallas,* 377 U.S. 408 (1964), which invoked "a general rule * * * that state and federal courts would not interfere with or try to restrain each other's proceedings." 377 U.S. at 412. Thus, "where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other," quoting *Princess Lida v. Thompson,* 305 U.S. 456, 466 (1930).[10] *Ibid.* And, this Court remanded "for further proceedings not inconsistent with this opinion." 434 U.S. at 19.

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[10]GAC's argument (Pet. 14-15) that *Donovan* held that only the federal forum could decide a claim of *res judicata* is mistaken. The reference in the sentence quoted by GAC to a decision by a federal court of such a claim merely reflects the fact that in *Donovan* the first court to enter a judgment was the state

Accordingly, GAC had no basis to complain about the New Mexico court's exercise of jurisdiction prior to the filing of a timely motion for a stay of proceedings pursuant to § 3 of the Federal Arbitration Act (9 U.S.C. § 3).[11] When GAC finally filed such a motion after almost two years of intensive litigation (see pp. 3-6 *supra*), the trial court found that GAC had waived arbitration by its inconsistent litigation activities and that, in any event, all issues were inarbitrable antitrust issues or inextricably entwined therewith, and entered two partial final judgments: one enjoining arbitration and the other denying a stay of the litigation pending arbitration. See pp. 6-7 *supra*. GAC's mandamus petition in *Felter II* contended that *both* judgments violated *Felter I*. While this Court granted that petition as to the judgment staying arbitration, since it "interfere[d] with attempts by GAC to assert in federal forums what it views as its entitlement to arbitration," 436 U.S. at 496, this Court denied that petition as to the judgment denying a stay of litigation pending arbitration since that judgment did not "restrict[] GAC from pursuing its arbitration claims in other forums." 436 U.S. at 498 n.2. "Clearly, our [*Felter I*] opinion did not preclude the court from making findings concerning whether GAC had waived any right to arbitrate or whether such a right was contained in the relevant agreements. Nor did our prior decisions prevent the Santa Fe court, on the basis of such findings, from declining to stay its own proceedings as requested by GAC pending arbitration in other forums." 436 U.S. at 496-97.

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court, so that the federal suit happened to be the "second suit" in which the *res judicata* plea normally would be raised. See 377 U.S. at 412. And, of course, nothing in *Donovan* purports to hold that a court reviewing an arbitration award cannot decide *res judicata* issues.

[11] A "court has jurisdiction to litigate a contract, despite * * * an arbitration clause," and the "remedy of the party claiming [arbitration] * * * is a stay of proceedings until it has been had or a default in pursuing the arbitration is shown, 9 U.S.C.A. § 3 * * *." *William S. Gray & Co. vs. Western Borax Co.*, 99 F.2d 239, 240 (9th Cir. 1938). See, *e.g.*, *The Anaconda v. Am. Sugar Refining Co.*, 322 U.S. 42, 44 (1944); *Demsey & Associates v. S.S. Sea Star*, 461 F.2d 1009, 1017 (2d Cir. 1972); *United Electrical, R. & M. Workers v. Oliver Corp.*, 205 F.2d 376, 385 (8th Cir. 1953).

So, too, the judgment vacating the arbitration awards does not enjoin or restrict GAC from attempting "to assert in federal forums what it views as its entitlement to arbitration" or its views as to the validity of the arbitration awards. Indeed, GAC has done so (although unsuccessfully) without let or hindrance from the New Mexico courts. See pp. 11-13 *supra*. It is equally clear that the *Felter* opinions did not preclude the New Mexico courts from making findings concerning the validity of the arbitration awards or from vacating those awards on the basis of such findings. *Felter II* establishes beyond question that the New Mexico courts retained jurisdiction to make decisions adverse to the merits of GAC's arbitration claims and thus to proceed with the litigation, as the court below recognized. (Pet. App. 10a-11a.)

Moreover, when the New Mexico Supreme Court affirmed the partial final judgment denying a stay of litigation pending arbitration, it rejected arguments by GAC that this denial on the merits of GAC's claimed right to arbitration was inconsistent with the *Felter* cases. GAC's petition for writ of certiorari, which renewed those arguments, was denied. [12] See pp. 7-8 *supra*. GAC reiterated those arguments in its appeal from the New Mexico judgment holding the 1973 Supply Agreement to be "null, void, unenforceable and of no effect whatever," but this Court dismissed the appeal for want of jurisdiction and denied certiorari. [13] See pp. 8-9 *supra*. GAC again restated its *Felter* arguments in proceedings arising from its application to a California state court for confirmation of the arbitration award, including its petition for writ of certiorari from the dismissal of

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[12] See Pet. in No. 79-190 at 24-33, 36-38, and compare Brief for Respondent United Nuclear Corporation in Opposition in No. 79-190 at 22-24 and 31 n.29.

[13] See Juris. Stmt. in No. 80-1360 at 23-25, and compare Motion of United Nuclear Corporation to Dismiss or Affirm in No. 80-1360 at 22-25.

that proceeding, and this Court again denied certiorari.[14] See p. 12 *supra*. And, when the New Mexico trial court entered its judgment vacating the arbitration awards — the judgment which, as affirmed by the New Mexico Supreme Court, GAC now seeks to have reviewed — GAC petitioned this Court for a writ of mandamus contending, as it does now, that the *Felter* decisions had been violated.[15] Once again, this Court denied the petition. See p. 13 *supra*.

In short, as stated by the New Mexico Supreme Court in the opinion now sought to be reviewed (Pet. App. 12a):

> "If ever a court decision were etched in bronze, it would be the one holding that *Felter I* and *Felter II* did not prevent our state courts from deciding all the material issues in this case. *United Nuclear Corp. v. General Atomic Co.*, (our 1979 opinion), *supra* [93 N.M. 105, 597 P.2d 290]. Like a yo-yo, this question has been propelled to and fro innumerable times between lower courts and the United States Supreme Court. Each time the result has been a rejection of GAC's claims. If the doctrines of *res judicata* and the law of the case still have efficacy under our law, this issue has been adequately set at rest."

Of course, the court below concluded that the doctrines of *res judicata* and law of the case do still have efficacy under New

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[14] The California Court of Appeal, in directing dismissal of GAC's confirmation petition for lack of *in personam* jurisdiction, held that such jurisdiction could not be conferred by the arbitration clause in the 1973 Supply Agreement because of the *res judicata* effect of the New Mexico judgments. GAC contended that the California court thereby "failed to implement" this Court's *Felter* decisions "and compounded the New Mexico courts' prior violations of the Supremacy Clause" as interpreted in the *Felter* decisions. Pet. in No. 80-2106 at 23. See, generally, *id.* at 23-26, and compare Brief for Respondent in Opposition in No. 80-2106 at 15-19.

[15] See Pet. in No. 80-2107 at 8-14, and compare Brief for Respondent United Nuclear Corporation in Opposition in No. 80-2107 at 12-17.

Mexico law and thus that GAC's arguments based on the *Felter* decisions were foreclosed by each of those state-law doctrines (Pet. App. 12a-13a) as well as being erroneous (Pet. App. 10a-11a).

Since that *res judicata* ruling provided an independent state-law basis for rejecting GAC's *Felter* arguments, those arguments are not reviewable by this Court regardless of their merits. *Postal Telegraph Cable Co. v. Newport*, 247 U.S. 464, 475 (1918); *Northern Pacific Railroad Co. v. Ellis*, 144 U.S. 458, 464-65 (1892); *San Francisco v. Itsell*, 133 U.S. 65 (1890).[16] Moreover, the foregoing recital demonstrates that those arguments are meritless. In view of this Court's grant of an extraordinary writ in *Felter II* to correct a violation by the New Mexico trial court of this Court's mandate in *Felter I*, it is hardly conceivable that, on three occasions, this Court would have denied direct review of appellate judgments upholding decisions adverse to GAC's arbitration claims, and in addition denied review on a mandamus petition of the very trial court judgment which as affirmed on appeal is in issue here, if this Court perceived any merit in GAC's interpretation of the *Felter* decisions.[17] This Court should reject once again GAC's attempt to obtain review of that issue.

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[16] While it is immaterial in view of the *res judicata* holding, we believe that nonreviewability also results from the New Mexico Supreme Court's law-of-the-case holding. Under New Mexico law, law of the case is not a discretionary doctrine, but is akin to *res judicata* in that it prevents "the legal question so resolved" in an earlier appeal from "being determined in a different manner on a subsequent appeal" even if "the first ruling was in error." Pet. App. 13a and cases there cited. *Cf. Northern Pacific Railroad Co. v. Ellis, supra*; compare *Southern Ry. Co. v. Clift*, 260 U.S. 316, 319-20 (1922).

[17] In opposing that mandamus petition, UNC conceded that the writ should issue if the trial court's vacation of the arbitration awards violated the *Felter* mandates, but went on to demonstrate that no such violation occurred. See Brief for Respondent United Nuclear Corporation in Opposition in No. 80-2107 at 11-12.

## II. The New Mexico Courts Properly Applied Section 10 of the Federal Arbitration Act in Vacating Arbitration Awards Which the Arbitrators Had No Power to Make.

There is no substance whatever in GAC's contention (Pet. 15-19) that the New Mexico courts misapplied Section 10 of the Federal Arbitration Act in vacating the arbitration awards. GAC's arguments would turn the Act on its head by permitting arbitrators to override judicial determinations as to arbitrability, without any effective judicial review. That cannot rationally be and is not the law.

In enacting the Federal Arbitration Act, "the purpose of the Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint v. Flood & Conklin,* 388 U.S. 395, 404 n.12 (1967). Thus, the existence of a written arbitration agreement in maritime, interstate or foreign commerce is essential to arbitration under §§ 1 and 2 of the Act (9 U.S.C. §§ 1 and 2). That "threshold" issue is for the courts to decide, *Bernhardt v. Polygraphic Co.,* 350 U.S. 198, 200-02 (1956); the courts, not arbitrators, determine if "the parties are subject to an agreement to arbitrate * * *." *Operating Engineers v. Flair Builders, Inc.,* 406 U.S. 487, 491 (1972). If the underlying contractual dispute already is being litigated, arbitrability issues are determined pursuant to a motion under § 3 (9 U.S.C. § 3) to stay the litigation pending arbitration, and if no litigation is pending, the remedy is a judicial proceeding under § 4 (9 U.S.C. § 4) to compel arbitration. While GAC never filed a § 4 petition to compel arbitration, it did file a § 3 motion for a stay pending arbitration after intensively litigating in the New Mexico proceeding for almost two years. See pp. 3-6 *supra.*

Whether a party has waived its right to arbitrate through inconsistent actions in litigation is universally held to be "a

question for determination by the courts,"[18] and the courts also have determined without exception that antitrust issues (and issues inextricably entwined therewith) are not arbitrable under the Act.[19] The New Mexico courts, in denying GAC's § 3 motion for a stay pending arbitration, accordingly held that they had jurisdiction under the Act to determine those arbitrability issues and that the underlying dispute was inarbitrable both because GAC had waived arbitration and because all issues were antitrust issues or issues inextricably entwined therewith; and this Court denied review of those rulings. See pp. 6-8 *supra*. Those rulings not only accord with the decisions of other courts, but are binding upon the parties under the New Mexico doctrines of *res judicata* and law of the case as the court below held (Pet. App. 14a). And, of course, not being arbitrable, the underlying dispute continued to be justiciable. The New Mexico courts proceeded to determine that the entire 1973 Supply Agreement — including its arbitration clause — was "null, void, unenforceable and of no effect whatever," and this Court also refused to review that decision. See pp. 8-9 *supra*.[20] Hence, no arbitration agreement exists to support either the partial or the final arbitration award.

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[18] *N & D Fashions, Inc. v. DJH Industries, Inc.*, 548 F.2d 722, 728-29 (8th Cir. 1976). See also, *e.g.*, *Martin Marietta Aluminum, Inc. v. General Elec. Co.*, 586 F.2d 143, 146 (9th Cir. 1978); Brief for Respondent United Nuclear Corporation in Opposition in No. 79-190 at 33-37 and cases there cited.

[19] See, *e.g.*, *Applied Digital Tech., Inc. v. Continental Cas. Co.*, 576 F.2d 116, 117-19 (7th Cir. 1978), and other cases cited in Brief for Respondent United Nuclear Corporation in Opposition in No. 79-190 at 37-41; compare *Bos Material Handling, Inc. v. Crown Controls Corp.*, 137 Cal. App. 3d 99, 109-11 (1982).

[20] GAC's reliance on *Prima Paint v. Flood & Conklin*, 388 U.S. 395 (1967) (Pet. 16), is misplaced. *Prima Paint* holds that a claim of fraud in the inducement of the entire contract is for the arbitrator to decide where the dispute otherwise is arbitrable. *Prima Paint* did not involve a prior judicial determination that an applicant for a 9 U.S.C. § 3 stay of litigation had waived its right to arbitration or a situation in which the underlying agreement was alleged to be void by reason of inarbitrable antitrust issues. Thus, *Prima Paint* has no application to this case. Indeed, GAC did not even contend that *Prima*

This appears to be the first case in which arbitrators have proceeded to arbitrate in the face of a judicial determination that a dispute is not arbitrable. Such an unprecedented occurrence cannot be expected to recur, and thus the case does not have the general importance that might warrant review by this court. But however that may be, the Congress hardly could have intended to insulate from judicial review and correction arbitration awards that flout the Act's allocation of power between courts and arbitrators, and it did not do so. Rather, § 10(d) expressly provides for vacation of an arbitration award "[w]here the arbitrators exceeded their powers." 9 U.S.C. § 10(d).[21] The arbitrators here plainly "exceeded their powers" in presuming to decide that arbitration had not been waived (Pet. App. 60a-66a) to decide inarbitrable antitrust issues (Pet App. 109a-113a) as well as the other issues entwined therewith, and to issue an award purporting to enforce a contract which had been judicially determined to be of "no effect whatever."

Thus, the courts have consistently held that, on review of an arbitration award, "whether the arbitrator had jurisdiction over a particular dispute — *i.e.*, whether the controversy is arbitrable

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*Paint* prevented the New Mexico courts from rendering the sanctions judgment in requesting this Court to review that judgment (Juris. Stmt. in No. 80-1360). GAC did contend (erroneously) that the arbitrability rulings of the New Mexico courts conflicted with *Prima Paint* (Pet. in No. 79-190 at 38-40) in requesting this Court to review those rulings, but the Court denied review.

[21] In addition, some courts have recognized that an arbitration award may be vacated if the arbitrators acted in "manifest disregard" of the law or contrary to an established public policy. See, *e.g.*, *National R.R. Pass. Corp. v. Chesapeake & O. Ry.*, 551 F.2d 136, 143 (7th Cir. 1977); *Aerojet-General Corp. v. American Arbitration Ass'n*, 478 F.2d 248, 252 (9th Cir. 1973); and *Saxis Steamship Co. v. Multifacs International Traders, Inc.*, 375 F.2d 577, 582 (2d Cir. 1967), all of which are cited by GAC (Pet. 18); see also, *e.g.*, *Johns-Manville Sales v. Intern. Ass'n of Machinists*, 621 F.2d 756, 759 (5th Cir. 1980). While we agree with the court below that the instant awards also are vacatable under these standards (Pet. App. 17a, 32a), we see no need to pursue that matter further in view of the plain applicability of the express statutory standard for vacating an award when the arbitrators exceeded their powers.

— is a question for the court to decide." *Intern. Broth. of Team., Etc. v. W. Pa. Mo. Car.*, 574 F.2d 783, 787 (3d Cir.), *cert. denied*, 439 U.S. 828 (1978). "While the court may refer to an arbitrator's discussion on arbitrability in order to aid its determination, * * * it must make its own independent determination of this threshold issue" in reviewing an arbitration award. *Mobil Oil v. Local 8-766, Oil, Chemical & Atomic*, 600 F.2d 322, 325 (1st Cir. 1979). See also, *e.g., Davis v. Chevy Chase Financial Ltd.*, 667 F.2d 160, 166-67 (D.C. Cir. 1981). And, of course, where the underlying dispute has been decided in litigation "there [is] no controversy to arbitrate." *Fremont Cake & Meal Co. v. Wilson & Co.*, 183 F.2d 57, 59 (8th Cir. 1950). If "no arbitration agreement exists the arbitration award * * * is void," *Great American Trading v. I.C.P. Cocoa, Inc.*, 629 F.2d 1282, 1288 (7th Cir. 1980). Here, the 1973 Supply Agreement — including its arbitration clause — had been judicially determined to be "null, void, unenforceable and of no effect whatever." When the underlying dispute has been decided by a judgment that is *res judicata*, an arbitration award purporting to decide that dispute in a contrary manner will be vacated. *Telephone Workers Union v. N.J. Bell Tel.*, 584 F.2d 31 (3d Cir. 1978).

The fact that these issues going to the power or jurisdiction of the arbitrators were decided by the New Mexico courts prior to the arbitration awards obviously does not mean that those courts cannot vacate the awards, but rather provides an additional reason for doing so. The "res judicata or collateral estoppel effect of the prior determination is a question for the court, not for the arbitrator before whom the point is sought to be relitigated." *N.Y.S. Association for Retarded Children v. Carey*, 456 F. Supp. 85, 96 (E.D.N.Y. 1978). "This is so whether the question arises in an action to compel arbitration * * * or, as here, in an action to" review "a disputed award." *Telephone Workers Union v. N.J. Bell Tel., supra*, 584 F.2d at 33. See also *Clemens v. Central Railroad Company of New Jersey*, 399 F.2d 825 (3d Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969); *Lummus*

*Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 87 (2d Cir. 1961), *cert denied*, 368 U.S. 986 (1962); *Garlick Funeral Homes v. Local 100, Ser. Emp., Inc.*, 413 F. Supp. 130 (S.D.N.Y. 1976); *Ballard & Associates, Inc. v. Mangum*, 368 A.2d 548, 553 (D.C. 1977). [22]

There is no conflict of decisions, despite GAC's assertions to the contrary (Pet. 17-18). [23] The decision by the court below accords with the language of the Federal Arbitration Act, with other decisions under that Act, and with common sense, and does not raise an issue of general importance which this Court should review and decide.

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[22] GAC asserts that "two federal district judges also said in related litigation that the arbitrators had jurisdiction to decide [the *res judicata*] question." (Pet. 16-17.) GAC refers to statements made in the course of holdings that the federal courts did not have subject matter jurisdiction of suits to restrain arbitration (see Pet. 17 n.9 and p. 10 nn.8-9 *supra*.). GAC does not and could not claim that those courts held that the *res judicata* issues must be submitted to the arbitrators. Moreover, those courts neither held nor suggested that a court could not determine arbitrability issues, including *res judicata* issues relevant thereto, upon review of an arbitration award. Finally, UNC's limited participation under protest in the arbitration proceedings (see pp. 9-11 *supra*) did not waive its right to dispute the arbitrators' jurisdiction or the validity of the arbitration awards upon review thereof. *E.g., Davis v. Chevy Chase Financial Ltd., supra*, 667 F.2d at 167; *Local 719, American Bakery & C. Wkrs. v. National Biscuit Co.*, 378 F.2d 918, 921-22 (3d Cir. 1967).

[23] None of the cases cited by GAC for the proposition that the decision below "conflicts with numerous decisions by the federal courts that strictly limit judical review of arbitration awards" (Pet. 18) either decided or suggested that arbitrability issues going to the jurisdiction of the arbitrators, including relevant *res judicata* contentions, are not for the courts to decide. Furthermore, while the district court in *Boston and Maine Corp. v. Illinois Central Railroad Co.*, 396 F.2d 425 (2d Cir. 1968), indicated that it was precluded from reviewing the merits of an arbitrator's rejection of a claim of *res judicata*, in fact that court went on to determine "that neither the defense of *res judicata* nor the related doctrine of collateral estoppel is available to the defendant" since the "decision of the State court relied upon was a denial of summary judgment, not a final decision on the merits." 274 F. Supp. 257, 260-61 (S.D.N.Y. 1967). Insofar as appears from the opinion of the Second Circuit, that issue was not involved in the appeal. *Refino v. Feuer Transp., Inc.*, 480 F. Supp. 562 (S.D.N.Y. 1979), *aff'd without opinion*, 633 F.2d 205 (2d Cir. 1980), involved the effect to be

## III. Section 10 of the Federal Arbitration Act Did Not Deprive the New Mexico Courts of Venue.

Section 9 of the Federal Arbitration Act provides that "[i]f no court is specified in the agreement of the parties, then such application [to confirm the award] may be made to the United States court in and for the district within which such award was made." Section 10 provides that "the United States court in and for the district wherein the award was made" may vacate an award upon application by a party thereto for specified reasons. GAC asserts (Pet. 19) that the decision below is the first to hold that those venue provisions "limit federal court venue but are not applicable to state courts" (Pet. App. 16a). Even assuming that is so, no court has held to the contrary, and the issue obviously does not have the kind of general importance that might warrant review by this Court.[24] In fact, similar arguments by GAC based upon the quoted language of §§ 9 and 10 have been rejected in prior litigation between the parties, and the decision below accords with general principles established by this Court concerning the application of venue provisions of federal statutes.

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given to a prior arbitration decision (see 480 F. Supp. at 565, 567), rather than the *res judicata* effect of a prior judicial determination. In both of those cases, the *res judicata* issues arose in connection with the merits of the underlying dispute, rather than in connection with issues of arbitrability.

[24]The cases cited by GAC (Pet. 20) involved the venue of federal district courts and did not involve the venue of state courts or intimate any views in that regard. State courts have the jurisdiction, and indeed the duty, to apply the Federal Arbitration Act in litigation involving contracts subject to that Act. *Commercial Metals Co. v. Balfour, Guthrie & Co., Ltd.*, 577 F.2d 264, 269 (5th Cir. 1978). See, *e.g.*, 13 Wright Miller & Cooper, *Federal Practice and Procedure* § 3569 at 470 n.14 (1975) and cases there cited. Even if the federal courts have independent subject matter jurisdiction, it is concurrent with the jurisdiction of state courts. *Victoria Milling Co. v. Hugo Neu Corporation*, 196 F. Supp. 64 (S.D.N.Y. 1961); *Cocotos Steamship Co. of Panama S.A. v. Hugo Neu Corp.*, 178 F. Supp. 491, 492 (S.D.N.Y. 1959); cf. *Dowd Box Co. v. Courtney*, 368 U.S. 502, 505-08 (1962).

GAC relied on that language of §§ 9 and 10 in its attempts to confirm the arbitration award in the federal and state courts of California. In the federal proceedings, GAC contended that §§ 9 and 10 conferred subject matter jurisdiction on the federal district court in California to review the arbitration awards. The district court and the Ninth Circuit both rejected that argument, agreeing with every other federal court that has decided the issue, that the language sounds in venue rather than subject matter jurisdiction, and this Court denied certiorari.[25] See pp. 11-12 *supra*.

In its California state court confirmation proceeding, GAC contended that § 9 of the Act gave California courts *in personam* jurisdiction over UNC. The California Court of Appeal directed dismissal of GAC's action for lack of *in personam* jurisdiction, but it also concluded that, even if jurisdiction had existed, "the doctrine of *forum non conveniens* would require, at a minimum, a stay of the action here, in order to permit [UNC's] pending action in the Santa Fe district court in New Mexico, in which the arbitration award is challenged, to proceed to judgment." 113 Cal. App. 3d 359, 169 Cal. Rptr. 827.[26] That ruling necessarily rejected GAC's interpretation of § 10 as limiting the venue of

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[25] In its petition to this Court, GAC relied on § 9. See Pet. in No. 81-1221 at 7-8 and compare Brief for Respondent in Opposition in No. 81-1221 at 11-22. GAC repeated those arguments, relying primarily on § 10, in defending its removal of UNC's petitions to vacate the awards, and the U.S. District Court for the District of New Mexico rejected those arguments in remanding to the New Mexico courts. See pp. 12-13 *supra*. Thus, final judgments entitled to *res judicata* effect (Pet. App. 13a) establish that no federal court can vacate or confirm these arbitration awards.

[26] The Court of Appeal continued:

> "Also, even if that action were not pending, the courts of New Mexico are obviously the more suitable forums to determine these issues with which they are intimately familiar. The parties have wasted too much time already in adding to the many forums in which they have litigated the state courts of California." *Id.*

state court proceedings to review arbitration awards, as GAC contended in its unsuccessful petition for certiorari to this Court.[27] See p. 12 *supra*. That ruling was consistent with the decisions of other courts. See *AAACon Auto Transport, Inc. v. Newman*, 77 Misc. 2d 1069, 356 N.Y.S.2d 171, 174-75 (1974), and *AAACon Auto Transport, Inc. v. Feldman*, 77 Misc. 2d 120, 353 N.Y.S.2d 851 (1973), both of which applied the doctrine of *forum non conveniens* in actions under the Federal Arbitration Act, since the venue provisions of that Act do not "by their terms apply to any but the U.S. District Courts." 356 N.Y.S.2d at 174.

Such an interpretation is commanded by *Bainbridge v. Merchants & Miners Co.*, 287 U.S. 278 (1932). That case involved the Jones Act (now 46 U.S.C. § 688), which provides: "Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." This Court, which had previously held that the provision related to venue rather than to subject matter jurisdiction,[28] concluded that it did not control the venue of suits under the Jones Act in state courts, as the correct construction of the provision limits it to the courts of the United States." *Id.* at 280. The Court pointed out (*id.* at 280-81) that:

> "The word 'district' is peculiarly apposite in that relation; but in order to apply it to a state court, whose territory for venue purposes may or may not be designated as a 'district,' an elasticity of interpretation would be required which it does not seem probable Congress had in mind. * * * If the question were more doubtful than we think it is, we should be slow to impute to Congress an intention, if it has the power, to interfere with the statutory

[27] GAC's arguments to this Court in that case are virtually identical in substance to its present arguments (Pet. 19-21). See Pet. in No. 80-2106 at 20-22 and compare Brief for Respondent in Opposition in No. 80-2106 at 22-25.

[28] *Panama R.R. v. Johnson*, 264 U.S. 375, 384-85 (1924). See 287 U.S. at 279 n.1.

provisions of the various states fixing the venue of their own courts. It follows that the venue should have been determined by the trial court in accordance with the law of the state." (Footnote omitted.)

See also, *e.g.*, *Pope v. Atlantic Coast Line Railroad*, 345 U.S. 379, 384 (1953); *Miles v. Illinois Central Railroad*, 315 U.S. 698, 703 (1942).

Since §§ 9 and 10 of the Federal Arbitration Act expressly identify the district courts to which they refer as the "United States" district courts, the inapplicability of those provisions to the venue of state courts follows *a fortiori* from *Bainbridge*. Furthermore, nothing in the legislative history of the Act justifies "imput[ing] to Congress an intention, if it has the power, to interfere with" (287 U.S. at 280-81) the laws of the several states establishing the venue or jurisdiction of their courts.[29]

There is no "anomaly," as GAC contends (Pet. 20 & 21 n.11), in the Arbitration Act's failure to limit the venue of state court proceedings. A party seeking to vacate or confirm an award must still find a court with personal and subject matter jurisdiction. The doctrines of *res judicata* and full faith and credit stand to prevent "judicial rivalry" (Pet. 21), as they do in any other dispute that may be tried in state courts. The only anomaly apparent in this case results from GAC's argument: since the arbitration award cannot be reviewed in federal court and since the California state courts lack *in personam* jurisdiction, GAC's argument leads to the conclusion that no court in the country can

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[29] For the legislative history, see *Sales and Contracts To Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearings on S. 4213 & S. 4214 Before a Subcomm. of the Senate Judiciary Comm.*, 67th Cong., 4th Sess. (Jan. 31, 1923); *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before Subcomms. of the House and Senate Judiciary Comms.*, 68th Cong., 1st Sess. (Jan. 9, 1924); H.R. Rep. No. 96, 68th Cong., 1st Sess. (Jan. 24, 1924); S. Rep. No. 536, 68th Cong., 1st Sess. (May 14, 1924); 65 Cong. Rec. 1931, 11080-82 (1924); 66 Cong. Rec. 984, 2759-62, 3003-04 (1924-25).

review this arbitration award. No authority cited by GAC supports that extraordinary result, and the matter is not worthy of review by this Court.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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## APPENDIX

## THE FEDERAL ARBITRATION ACT, 9 U.S.C. §§ 1-14 (1976)[1]

### § 1. "Maritime transactions" and "Commerce" defined; exceptions to operation of title

"Maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce," as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. (July 30, 1947, ch. 392, 61 Stat. 670, derived from Act Feb. 12, 1925, ch. 213, § 1, 43 Stat. 883.)

### § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part

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[1] The Federal Arbitration Act was originally enacted by Act of February 12, 1925, ch. 213, 43 Stat. 883. Title 9 of the U.S. Code was enacted by Act of July 30, 1947, ch. 392, § 1, 61 Stat. 669.

thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. (July 30, 1947, ch. 392, 61 Stat. 670, derived from Act Feb. 12, 1925, ch. 213, § 2, 43 Stat. 883.)

**§ 3. Stay of proceedings where issue therein referable to arbitration**

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. (July 30, 1947, ch. 392, 61 Stat. 670, derived from Act Feb. 12, 1925, ch. 213, § 3, 43 Stat. 883.)

**§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination**

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure.

The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof. (July 30, 1947, ch. 392, 61 Stat. 671, derived from Act Feb. 12, 1925, ch. 213, § 4, 43 Stat. 883, amended, Sept. 3, 1954, ch. 1263, § 19, 68 Stat. 1233.)[2]

[2]The Act of Sept. 3, 1954, substituted "United States district court" for "court of the United States" in the first sentence; "Title 28, in a civil action" for "the judicial code at law, in equity" in the first sentence; "the Federal Rules of Civil Procedure" for "law for the service of summons in the jurisdiction in which the proceeding is brought" in the third sentence; and "the Federal Rules of Civil Procedure" for "law for referring to a jury issues in an equity action" in the eighth sentence.

**§ 5. Appointment of arbitrators or umpire**

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator. (July 30, 1947, ch. 392, 61 Stat. 671, derived from Act Feb. 12, 1925, ch. 213, § 5, 43 Stat. 884.)

**§ 6. Application heard as motion**

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided. (July 30, 1947, ch. 392, § 1 Stat. 571, derived from Act Feb. 12, 1925, ch. 213, § 6, 43 Stat. 884.)

**§ 7. Witnesses before arbitrators; fees; compelling attendance**

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators,

or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States. (July 30, 1947, ch. 292 § 1, Stat. 672, derived from Act Feb. 12, 1925, ch. 213, § 7, 43 Stat. 884, amended, Oct. 31, 1951, ch. 655, § 14, 65 Stat. 715.)[3]

**§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property**

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award. (July 30, 1947, ch. 392, 61 Stat. 672, derived from Act Feb. 12, 1925, ch. 213, § 8, 43 Stat. 884.)

**§ 9. Award of arbitrators; confirmation; jurisdiction; procedure**

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time

[3] The Act of Oct. 31, 1951 substituted "United States district court for" for "United States court in and for" and "by law for" for "on February 12, 1925, for."

within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. (July 30, 1947, ch. 392, 61 Stat. 672, derived from Act Feb. 12, 1925, ch. 213, § 9, 43 Stat. 885.)

**§ 10. Same; vacation; grounds; rehearing**

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown,

or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators. (July 30, 1947, ch. 392. 61 Stat. 872 derived from Act Feb. 12, 1925, ch. 213, § 10, 43 Stat. 383.)

**§ 11. Same; modification or correction; grounds; order**

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration —

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties. (July 30, 1947, ch. 392, 67 Stat. 673, derived from Act Feb. 12, 1925, ch. 213, § 11, 43 Stat. 863.)

### § 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award. (July 30, 1947, ch. 392, 61 Stat. 673, derived from Act Feb. 12, 1925, ch. 213, § 12. 43 Stat. 385.)

### § 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered. (July 30, 1947, ch. 392, 61 Stat. 673, derived from Act Feb. 12, 1925, ch. 213, § 13, 43 Stat. 886.)

**§ 14. Contracts not affected**

This title shall not apply to contracts made prior to January 1, 1926. (July 30, 1947, ch. 392. 61 Stat. 673, derived from Act Feb. 12, 1925, ch. 213, § 15, 43 Stat. 886.)